STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE NO. 24-97:

CULBERTSON EDUCATION ASSOCIATION, MEA/NEA,	)	
Complainant,	)	
- VS -	)	FINAL ORDER
CULBERTSON PUBLIC SCHOOL BOARD OF TRUSTEES,	)	
Defendant.	)	

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The above-captioned matter came before the Board of Personnel Appeals on February 25, 1999. Arlyn L. Plowman, Director of Personnel Services for the Montana School Boards Association, appealed to the Findings of Fact, Conclusions of Law and Order issued by a Department hearing officer, dated September 24, 1998.

Appearing before the Board were Arlyn L. Plowman, on behalf of the Defendant and Karl J. Englund, attorney for the Complainant. Both parties participated in person.

After review of the record and consideration of the arguments by the parties, the Board concludes as follows:

1. Finding of Fact No. 1 is not supported by substantial evidence. Accordingly, it is hereby vacated and the following substituted in its place:

> 1. *Complainant Association is a labor organization which is the exclusive representative for certain employees of the Defendant/employer including all teachers in the school certified in Class 1, 2, 4 and 5 whose position requires such certification.*

2. A portion of Finding of Fact No. 5, is not supported by substantial evidence. Accordingly, the word "district" found on Page 3, line 11 of such finding is hereby deleted and the word "*association*" substituted in its place.

3. A portion of Finding of Fact No. 6 is not supported by substantial evidence. Accordingly, the phrases "professional and personal leave ("p/p leave")" and "p/p leave" found on Page 3, lines 15 and 16, respectively, are hereby deleted and the phrase "*sick leave*" substituted therefore.

4. A portion of Finding of Fact No. 9 is not supported by substantial evidence. Accordingly, the phrase "p/p leave" found on both lines 14 and 15 of Page 4, are hereby deleted and the phrase "*sick leave*" substituted therefore.

5. A portion of Finding of Fact No. 11 is not supported by substantial evidence. Accordingly, the phrase "p/p leave" found on line 1 of Page 5, is hereby deleted and the phrase "*sick leave*" substituted in its place.

6. A portion of Finding of Fact No. 14 is not supported by substantial evidence. Accordingly, the phrase "p/p leave" found on line 11 of Page 5, is hereby deleted and the phrase "*sick leave*" substituted in its place.

7. A portion of Finding of Fact No. 17 is not supported by substantial evidence. Accordingly, the phrase "p/p leave" found on line 1 of Page 6, is hereby deleted and the phrase "*sick leave*" substituted in its place.

8. A portion of Finding of Fact No. 18 is not supported by substantial evidence and is inherently inconsistent with the first sentence of Finding of Fact No. 21. Accordingly, the first sentence of Finding of Fact No. 18 is hereby deleted.

9. Portions of the Hearing Officer's "Opinion" section were not supported by substantial evidence of record and/or were legally incorrect. These sections, together with the Board's corrections are noted below:

A. On line 5 of page 8 the language "The district was inflexible on major economic issues. Its . . . " is hereby vacated and the phrase "*The district's*" substituted therefore.

B. The two sentences found on lines 15 through 18 of page 9, are hereby deleted and the following language substituted therefore:

This response, when considered cumulatively with the other complained of activity, fails to establish a totality of conduct evidencing that the district was negotiating in bad faith. Thus, no unfair labor practice occurred under the totality of conduct rationale.

10. Conclusion of Law No. 2, found on the bottom of page 9 is legally incorrect and is hereby voided.

11. The Conclusion of Law found at the top of page 10 (mistakenly identified as number "2", but actually No. 3 in sequence) is also legally incorrect and hereby voided.

Wherefore, having made the foregoing factual and legal corrections to the Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order, the Board orders as follows:

1. **IT IS HEREBY ORDERED** that the decision of the Hearing Officer is overturned.

2. IT IS FURTHER ORDERED that no unfair labor practice was committed and that this case is dismissed.

DATED this 23 day of March, 1999.

BOARD OF PERSONNEL APPEALS

BY: James A. Rice, Jr.
James A. Rice, Jr.
Presiding Officer

* *

Board members Schneider, Vagner and Talcott concur.
Board members Rice and Perkins dissent.

* *

State of Montana
Department of labor and Industry, Hearings Bureau
Before the Board of Personnel Appeals

In the Matter of Unfair Labor Practice No. 24-97:

Culbertson Education Association, MEA/NEA, Complainant, vs. **Culbertson Public School Board of Trustees,** Defendant.	*Findings of Fact, Conclusions of Law and Recommended Order*

I. Procedure, Authority and Hearing

On May 29, 1997, the Culbertson Education Association, MEA/NEA, filed an unfair labor practice complaint against the Culbertson Public School Board of Trustees. The complaint alleged that the Defendant had violated §39-31-305(1) and (2) MCA, and had committed an unfair labor practice under §39-31-401 MCA. The Defendant filed a response on June 13, 1997, denying the allegations contained of the complaint.

On July 14, 1997, the department issued its Investigative Report and Determination. On August 28, 1997, the Board of Personnel Appeals gave notice that Terry Spear was appointed as hearing officer. On September 9, 1997, the hearing officer gave notice of a prehearing conference, set for September 22, 1997. On September 16, 1997, complainant's counsel, Carey Matovich, Matovich & Keller, P.C., requested a continuance of the prehearing conference. The hearing officer granted the request, and rescheduled the prehearing conference for October 6, 1997. After the prehearing conference, the hearing examiner issued a prehearing order setting hearing for March 3, 1998. At the request of the parties, for the convenience of witnesses, the hearing officer reset telephonic hearing for March 5, 1998, and convened the hearing that day.

Under authority of §39-31-406, MCA, pursuant to ARM 24.26.682, the hearing officer conducted the administrative hearing according to the Montana Administrative Procedures Act, Title 2, Chapter 4, Part 6, MCA, with the purpose of determining the validity of the charges.

The parties had a full opportunity to present evidence relevant to the determinative issues, to present their arguments on all issues of law and to examine and cross examine witnesses. All formal hearing testimony was under oath or affirmation and recorded.

Carey Matovich represented the Complainant, and Maggie Copeland, UniServ Director for Area 4 of the Montana Education Association, was also present. Arlyn L. Plowman, Personnel Specialist, Montana School Boards Association, appeared and participated for the Defendant. Complainant called Kari Jensen, Dianne Larsen, Rory Carda, and Margaret Darr to testify. The Defendant called Ron Oelkers, Ron Mulé, and Rhonda Knudsen to testify. Exhibits 1 through 15 were admitted as joint exhibits.

Complainant filed its post-hearing brief and proposed decision on April 6, 1998. Defendant filed its proposed decision on April 7, 1998. Complainant filed its reply brief on April 20, 1998. Defendant filed its reply brief on April 20, 1998. Defendant then filed a brief requesting administrative notice on May 21, 1998. Complainant did not respond.

II. Issues

The issues for hearing, in accord with the prehearing order, were as follows:

1. Whether complainant's factual allegations (as set forth in the complaint and in the prehearing conference outline received 9-26-97) are true;

2. If complainant's factual allegations are true, whether the actions of defendant constitute bad faith bargaining;

3. Whether defendant has violated §§39-31-305(1) and (2) and 39-31-401 MCA, as alleged in the ULP complaint filed May 29, 1997.

Based upon the evidence at the hearing, and the post-hearing filings of the parties, the hearing officer now makes the following findings, conclusions and proposed order:

III. Findings of Fact

1. Complainant association is a K-12 teacher bargaining unit and the exclusive representative for its members within the defendant's employ.

2. Defendant district is a public school employer, and employs, among others, members of the association.

3. The association and the district are parties to a series of collective bargaining agreements. At the time this complaint was filed the association and the district were parties to the current collective bargaining agreement, effective July 1, 1995 through June 30, 1997 (Article IV, page one, Exhibit 15).

4. The agreement between the parties automatically renewed from year to year unless the association gave notice to the district before its regular January meeting of the association's desire to renegotiate portions of the contract. The association gave notice to the district in December 1996 of its desire to renegotiate the contract, testimony of Kari Jensen; thus, the then-current agreement expired on June 30, 1997.

5. The parties met and exchanged proposals for an agreement a total of five times before the district filed its complaint. The meetings occurred on March 13, April 10, April 21, May 1 and May 13, 1997.

6. On March 13, 1997, the association proposed (Exhibit 2):

(a) a one-year agreement, from 7/1/97 to 6/30/98 (Art IV);

(b) an increase of professional and personal leave ("p/p leave") from 10 to 12 days/year, an increase of the allowable accumulation of p/p leave from 75 to 80 days, and provision for a sick leave bank (Art. X);

(c) a change of payday from the 15th to the 5th of each month (Art. XI);

(d) an increase in the district's health insurance contribution from $275 to $300 per month for the one-year period (Art. XII);

(e) an increase in the base salary from $18,550 to $19,000 per year and an increase in the top of the salary schedule from $34,651 to $35,492 (App. A);

(f) increases in two extracurricular salary indices (band and choir), and addition of the National Honor Society Advisor to the non-athletic index at $100 (App. B);

(g) a workday change (Art. VIII), and

(h) a proposed calendar for the 1997-98 school year.

7. The district's initial proposal (Exhibit 6), also presented on March 13, 1997, included

(a) a two-year contract, from 7/1/97 to 6/30/99 (Art. IV);

(b) an increase in the district's health insurance contribution from $275 to $290 per month for both years, with no district payment of disability insurance (Art. XII);

(c) yearly tenured teacher evaluations, instead of every other year (Art. XIII);

(d) an increase in the base salary from $18,550 to $18,750 for the first year and to $18,950 for the second year (App. A);

(e) a change in the extracurricular table from an index based calculation to specific salaries. Some salaries would be increased and others unchanged from the previous agreement. The largest increases to the extracurricular salaries would be the athletic salaries (App. B); and

(f) deletion of the agreement to meet and confer about the school calendar.

8. On April 10, 1997, the district offered (Exhibit 7) the same terms as previously proposed, except that it offered to accept the association's workday change, sick leave bank, payday change, and increases in band and choir extracurricular salaries.

9. On April 21, 1997, the association offered (Exhibit 3) to accept 10 days of p/p leave per year but with an increase in the allowable accumulation of p/p leave, presented a new sick leave bank proposal and proposed a further increase in the district's health insurance contribution to $325 per month with the restoration of district payment of disability insurance. The association also proposed restoration of joint decisions on school year calendars, but if no agreement could be reached on the school calendar, a majority vote of the teachers would decide the calendar. The association offered to accept a lower increase of base salary (to $18,850 rather than $19,000) and proposed that extracurricular salaries be modified more uniformly, with more increases for non-athletic positions and lesser for athletic positions.

10. On April 21, 1997, the district offered (Exhibit 8) to reinstate the disability insurance premium payments, and otherwise presented the same offer as on April 10, 1997.

11. On May 1,1997, the association offered (Exhibit 4) a two-year contract, with the first year essentially identical to its April 21, 1997, offer, but reverting to the sick bank language it had originally proposed (and the district had subsequently adopted in its proposals) and adding positions to the extracurricular salaries. In the second year the association

proposed an increase in accumulated p/p leave days from 80 to 85, an increased health insurance contribution by the district from $325 to $335, and an increased base salary from $18,850 to $19,125.

12. On May 1, 1997, the district offered the same proposal as on April 21, 1997, except the addition of the National Honor Advisor to the extracurricular salaries.

13. On May 13, 1997, the association made another one-year offer (Exhibit 5), identical in all respects to its April 21, 1997, one-year proposal except that it dropped the sick leave bank, provided for negotiations on a calendar and added a Gifted and Talented Director to the extracurricular salaries.

14. On May 13, 1997, the district repeated its offer (Exhibit 10), but it offered increased accumulation of p/p leave to 85 days with no sick leave bank, an increase in base salary to $18,800 for the first year and $19,000 for the second year and proposed withdrawal athletic extracurricular salaries from the contract.

15. Some of the extracurricular positions that the district proposed to delete from the extracurricular salary schedule on May 13, 1997, were held by certified teachers within the bargaining unit. In other instances, persons holding these extra-curricular positions were not otherwise employed in positions within the bargaining unit. The agreement's (Exhibit 15), defined the bargaining unit as those teachers certified in Class 1, 2, 4 and 5 whose positions called for or required certification, but excluded certified individuals not under contract to perform teaching duties. The extra-curricular positions deleted in the district's May 13, 1997 proposal did not require certification.

16. At this point, the association's negotiators suggested agreement on a one-year contract. Ron Oelkers, board chair, responded for the district, that if the district had to propose a one-year contract there would be "much less on it." Testimony of Kari Jensen.

17. On May 27, 1997, the parties again met, and the district offered essentially the same two-year contract. For the first time, the district offered a one-year proposal. In that proposal[1], the district offered the same workday and payday provisions contained in the

[1] No exhibit contains the proposals of May 27, 1997.

current contract, the same p/p leave maximum accumulation as in the current contract, and an insurance contribution of $285 per month, $5 per month lower than the first offer the district made, on March 13, 1997 (but higher than the current contract). Testimony of Kari Jensen.

18. No meaningful negotiations have occurred since May of 1997. During negotiations, each time either party made a concession it considered major, it sought a corresponding concession from the adversary. Both parties relied upon their research regarding salaries and benefits from nearby or otherwise allegedly comparable districts. Neither side offered credible evidence that financial or equitable factors mandated acceptance of their proposals, or established the unreasonableness of the opponent's proposals.

19. The association's spokesperson suggested early on that the association expected the district to agree to higher wages, better benefits and working conditions. Testimony of Kari Jensen, Ron Oelkers and Ron Mulé. Throughout bargaining, the association took the position that the focus was properly on the concessions the district had to make to get a new contract.

20. From the testimony and exhibits, the district came to the negotiations with a clear definition of what it was willing to offer. It never wavered from that position, until it offered, at the behest of the association, a one-year proposal on May 27, 1997. Thus, while the association sought increases beyond those offered, using outside salary data from surrounding or otherwise comparable schools, the district sought concessions from the association in exchange for increases beyond those offered during the first two exchanges of written proposals. Ron Mulé's testimony regarding the necessity for the association to make concessions to obtain further concessions applies to the latter meetings, and accurately describes the district's position.

21. Since the complaint was filed, the parties have bargained on several occasions, including sessions with a Board of Personnel Appeals mediator. Neither party has requested or denied a request for additional bargaining sessions since the last mediation session.

IV. Opinion

The association alleges unfair labor practices by the district under §§39-31-305(1), 39-31-305(2) and 39-31-401(5) MCA. The law reads as follows:

39-31-305. Duty to bargain collectively -- good faith. (1) The public employer and the exclusive representative, through appropriate officials or their representatives, shall have the authority and the duty to bargain collectively. This duty extends to the obligation to bargain collectively in good faith as set forth in subsection (2) of this section.

(2) For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or his designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

39-31-401. Unfair labor practices of public employer. It is an unfair labor practice for a public employer to: . . . .

(5) refuse to bargain collectively in good faith with an exclusive representative.

If the district breached its statutory duty to bargain collectively in good faith as a public employer, then it did commit an unfair labor practice. *See, e.g., City of Great Falls v. Young*, 211 Mont. 13, 686 P.2d 185 (1984). The Montana Board of Personnel Appeals has adopted the totality of conduct standard when deciding whether an employer has failed to bargain in good faith. *MPEA v. City of Great Falls*, ULP #19-85 (1986); *MEA v. Laurel School District*, ULP #40-93 (1995). ***See also American Commercial Lines***, 291 NLRB 1066 (1988).

Offering proposals that cannot be accepted, with inflexible positions on major issues with no proposal of reasonable alternatives, violates the obligation of good faith bargaining. *See NLRB v. Wright Motors*, 603 F.2d 604 (7th Cir. 1979). In Montana, such conduct is viewed within the totality of conduct standard.

During the course of negotiations, the association started with the articulated goal of obtaining substantially increased economic benefits from the new contract. The basic rationale for this goal, from the evidence, was that comparable districts provided far greater economic benefits to their teachers--that Culbertson was below average. The district started with the articulated goal of providing fair increases to the teachers, relying upon other data. Neither party placed its data in evidence. Thus, the issue of good faith negotiation rests upon the conduct of the parties, rather than the objective validity of the economic proposals.

Both sides negotiated in the same fashion. That is, each party started with a self-defined fair package, then made adjustments to that package in light of the other side's proposals. The claim of unfair labor practice focuses upon three allegations of bad faith

negotiations: that the district was inflexible on major economic issues, that the district bargained regressively when it proposed a one-year contract with much less in it, and that the district proposed removal from the contract of the athletic portion in particular of the extracurricular schedule.[2]

The district was inflexible on major economic issues. Its initial package involved both cuts and increases (removal of the disability insurance from the package). After its second proposal, that of April 10, it made very limited further economic concessions. Since neither side documented the assertedly objective bases for proposals (with actual evidence of comparative salaries or the district budget and funding availability, for examples), this inflexibility can only be evaluated on its face. On its face, although it approaches an unfair labor practice, the evidence presented is insufficient to establish that it constituted, standing alone, an unfair labor practice.

Likewise, although the one-year contract offered by the district included substantially less than the first year of two-year packages offered by the district, this fact alone does not establish an unfair labor practice. Clearly, the association wanted more economic benefits than the district's best two-year package proposal. Reasonably, the district offered a one-year contract with more economic benefit than the prior contract, but with less than was offered for a contract that would bind the parties for a second year. Again, although the coercive impact of the "much less in it" one-year contract, offered with the same two year package as the only alternative, approaches an unfair labor practice, this offer alone is not an unfair labor practice.

In proposing the elimination of an extra-curricular activity salary index from the contract, the district went further. The index was a part of the current contract, and either the index (with different numbers from those of the association) or a salary table had been a part of the district's prior offers. But in addition, some, though not all, of the employees covered

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[2] The district's removal of the school year calendar from negotiations might be an instance of the district suggesting that it simply decide a matter previously included in the contract by itself and never again, by contract, negotiate over it at all. However, the association itself proposed a contract provision that if district and association could not agree upon the calendar, the teachers (i.e., the association) would decide the calendar. Both sides proposed independently that their opponent give up all right to determine finally the calendar. Thus, neither side ultimately offered any compromise. The calendar negotiations evidence both sides seeking to grasp unilateral decision-making power, and redound to neither party's benefit.

by the index were members of the bargaining unit. The only reason for the district's proposed removal of these entire salary determinations from the contract was the apparent desire of the district to increase coach salaries more (on a percentage basis) than teacher salaries. The association's unwillingness to agree prompted the district to propose simple excision of the salaries for athletic activities from the contract. No economic reason was offered, simply the district's desire to do as it deemed fit with those salaries, rather than bargain about them in the context of a master agreement. This directly affected at least some of the jobs of members of the bargaining unit. Because the salaries for athletic activities would be higher than if an association proposal was adopted, the district was willing to spend more money outside of the contract, to obtain total control of the athletic activities salaries, and also willing to spend more money within the contract to obtain that control.

Even though the district ably argues that it can legally exclude the salaries for athletic activities from the contract, those salaries were part of the existing contract. The proposal to remove those salaries came in response to negotiations suggesting a smaller increase in those salaries and a larger increase in teacher salaries. This draconian response, coupled with the other complained-of proposals, presents a totality of conduct that establishes the district was not negotiating in good faith. What each complained-of proposal does not, standing alone, establish, the combined proposals do establish.

V. Conclusions of Law

1. The Board of Personnel Appeals has jurisdiction over this matter. §§2-15-1705, 39-31-403, 39-31-406 MCA.

2. The District breached its statutory duty under §§39-31-305(1), 39-31-305(2), and 39-31-401(5) MCA to bargain collectively in good faith as a public employer and in so doing committed an unfair labor practice. Proposing removal of an existing schedule of pay covering at least some members of the bargaining unit for some duties, together with inflexible positions on major economic issues and a coercive reduced one-year proposal coupled with a reiterated two year proposal, constitute a totality of conduct that violates the district's statutory obligation of good faith bargaining.

2. The Association met its burden of demonstrating that the district has engaged in an unfair labor practice. The association is entitled to a Board of Personnel Appeals cease and desist order.

VI. Recommended Order

1. The district is ordered to cease and desist from its unfair labor practice.

2. The district shall refrain from violating the Montana Public Employees Collective Bargaining Act and shall negotiate with the association in full compliance with the Act.

3. The district shall make reports from time to time to the Board of Personnel Appeals, as the Board or by delegation department staff may require, showing the extent to which it has complied with this Order.

DATED: September 24, 1998.

BOARD OF PERSONNEL APPEALS

By: _____
Terry Spear
Hearing Officer

Notice of Aggrieved Parties' Rights

Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to A.R.M. 24.26.215 within 20 days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. §39-31-406(6) MCA. Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

Board of Personnel Appeals,
Department of Labor and Industry
P.O. Box 1728
Helena, MT 59624-1728.

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